Procedural Defaults: Balancing Systemic & Individual Justice

by D. Arthur Kelsey[1]

Procedural default law is sometimes thought of as little more than a spoiler — an antonym of justice made worse by its occasional arbitrary application. Without expressly acknowledging it, some judges subscribe to this thesis. They may enforce procedural defaults, but only reluctantly, as if to signal their disapproval of this seemingly necessary evil. I do not share this view of the subject. Though not every procedural default rule can be justified as a balanced application of higher principles, I believe most can. These justifying principles cluster around two core features of American law, neither of which we can do without.

The first principle arises out of the very structure of our courts. Unlike continental courts governed by civil law codes, common law judicial systems use an adversarial model of adjudication. The litigants — not the judges — determine the issues to be decided, the facts to be presented, and the range of remedies to be sought. By necessity, the adversarial model "is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring). In contrast to the "inquisitorial legal system" prevalent in European countries, where the civil law judge conducts the "factual and legal investigation himself," the American adversarial model "relies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356 (2006) (Roberts, C.J.) (emphasis in original and citation omitted).

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Procedural default rules "take on greater importance" in an adversarial model because they assign the sole responsibility for carrying out a litigable task to the person assigned the task: the litigant. *Id*. at 357. In this sense, procedural default rules represent the carefully calculated price litigants pay for the freedom of participating in self-directed litigation. Those who think the price too high should consider the alternative: a system where the judge acts more like an "inquisitor," *id*., unilaterally selecting the facts to be heard, the issues to be addressed, and the law to be considered. True, an inquisitorial judge would hardly countenance a procedural default. Doing so, after all, would be an admission of his mismanagement of the litigation. But a common law judge should have no such disinclination, since he simply decides the case solely "on the basis of facts and arguments pro and con adduced by the parties." *Id*. (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991)). To many, myself included, the neutrality of the judge in our litigant-centric model of justice is well worth the price we pay for it.

The second justifying principle also involves the concept of neutrality — not of the judge as the decisionmaker, but of the law as the rule of decision. No competitive contest takes place without time limits, boundaries, and agreed-upon methods of recording the score. The existence of these rules is a truism we accept as inherent to any contest. Truly neutral procedural rules allow courts to set limits and mark off boundaries without regard to which side stands to gain or lose. The official clock, for example, stops at the appointed moment no matter which side has the higher score. And wherever the out-of-bounds lines have been marked, they remain wholly immovable regardless of who steps over them.

This is as it should be, for procedural rules lose their legitimacy the moment they lose their neutrality. Selectively suspending procedural rules, in the hope of achieving some abstract notion of as-applied fairness in every case, would devolve into an *ad hoc* exercise of subjective justice: one which would not only armor-up any outcome-determinative biases of jurists, but also deploy these predispositions into open conflict with neutral principles of law. On the other hand, when courts apply procedural rules neutrally to every litigant, to every lawyer, to every case — without even a hint of partiality — everyone else knows exactly what is expected of them. To be sure, there is little point in having procedural rules "if they amount to nothing more than a juristic bluff — obeyed faithfully by conscientious litigants, but ignored at will by those willing to run the risk of unpredictable enforcement."[2] The more inflexible the rules, the less likely anyone will be tempted to bend them.

The only alternative to a judicial system that permits procedural defaults, as bad as that may be, is one that does not, which is worse by far. For there to be no procedural defaults in the trial court, litigants would have to concede control over their cases to inquisitorial trial judges and depend upon them to raise the winning arguments that only the judges (so far as the decision is theirs) know in advance to be winners.

Understandably so, those on the losing side of this form of *sua sponte* intervention would be tempted to question the impartiality of the judges and their commitment to neutral principles of law. The adversarial model wisely preserves the neutrality of the judges and the law by placing the responsibility to litigate solely on the litigants.

That said, I have no doubt that some procedural default principles may need to be recalibrated, either more tightly or loosely, to better balance the equities of particular forms of waiver. But whether

that is true or not, this much is certain: No procedural default principle has ever produced even the slightest injustice to litigants who know the principles well enough to stay out of trouble. The benign goal of procedural default law, therefore, is to render itself harmless by being so well known. It is with this goal in mind that I survey below the procedural defaults that seem to bedevil lawyers and judges the most.[3]

I. WAIVER BEFORE TRIAL

A. **Affirmative Pleadings**: A "court may not award particular relief unless it is substantially in accord with the case asserted" in the pleadings.[4] "It is beyond debate that '[n]o court can base its decree upon facts not alleged, nor render its judgment upon a right, however meritorious, which has not been pleaded and claimed. Pleadings are as essential as proof, the one being unavailing without the other.'"[5] Raise-or-waive examples include claims for punitive damages,[6] spousal support,[7] implied vs. express warranties,[8] fraud,[9] contract,[10] quasi-contract,[11] easement entitlements,[12] property trespass,[13] property boundaries,[14] mandamus compelling access to corporate records,[15] and disputed zoning ordinance interpretation.[16] The rules may permit a litigant to amend his pleadings if he discovers a mistake early, because, although "amendments are not a matter of right," a trial court's decision "refusing leave to amend after a showing of good cause is, in ordinary circumstances, an abuse of discretion."[17] Waiting too long, however, can be fatal. For example, if a jury verdict award is greater than the *ad damnum* request, such request cannot be modified to match the jury's award by a post-verdict amendment.[18]

B. **Defensive Pleadings**: A default judgment is perhaps the most notorious consequence of procedural default. A party in default, if not relieved from it, will be deemed to have admitted liability, conceded the facts in the complaint, waived all objections to the admissibility of evidence, and waived any right to a jury trial.[19] "In practical terms, it is also a waiver of appeal, [since] there is nothing there but an unlikely jurisdiction issue."[20] "Rule 3:8 provides no shelter from the obligation to draft and file a timely answer with respect to counts that are not demurrable."[21] As applied to any party, "the failure to serve and file a demand as required by Rule 3:21 constitutes a waiver of the right to jury trial."[22] Similar forfeitures result from the failure to plead affirmative defenses like contributory negligence[23] and the statute of limitations.[24] In civil trials, motions objecting to "any venue irregularity" are waived unless filed "within twenty-one days after service of process commencing the action."[25]

C. **Discovery Defaults**: Rule 1:18's pretrial scheduling order warns that experts "will not *ordinarily* be permitted to express any nondisclosed opinions at trial."[26] "To determine if [your case] is an ordinary case (where the non-disclosed opinion should be excluded) or the extraordinary case (where it should not), at least five factors should be taken into account: the 'surprise' to the other party; the ability of the offending party to 'cure that surprise'; the possibility that the 'testimony would disrupt the trial'; the party's 'explanation' for not providing a timely disclosure; and the alleged 'importance' of the testimony."[27]

D. **Motions That Must Be Raised Before Trial**: These include preliminary defense motions,[28] motions *in limine* "requir[ing] *argument exceeding five minutes*,"[29] challenges alleging "defects in the institution of the prosecution or in the written charge,"[30] and suppression motions alleging constitutional violations, speedy trial challenges, or double jeopardy claims.[31] A "change of venue motion" must

be made and a ruling obtained "before the jury [is] empanelled and sworn."[32]

II. WAIVER AT TRIAL

A. **Object Contemporaneously**: "Not just any objection will do. It must be both *specific* and *timely* — so that the trial judge would know the particular point being made in time to do something about it."[33] "The main purpose of requiring timely specific objections is to afford the trial court an opportunity to rule intelligently on the issues presented, thus avoiding unnecessary appeals and reversals. In addition, a specific, contemporaneous objection gives the opposing party the opportunity to meet the objection at that stage of the proceeding."[34]

1. **Be Specific**: Arguing insufficiency of evidence on one theory or element does not preserve a sufficiency argument based on another theory.[35] Nor does raising a statutory challenge to a criminal charge preserve a constitutional challenge[36] or vice versa.[37] Similarly, assigning error to a trial court's exclusion of evidence does not preserve an argument on "the circuit court's refusal to allow him to make the necessary proffer."[38] Procedural default rules preclude appellate courts from hearing arguments where, at trial, appellant objected to double-tier hearsay, but failed to specifically object to the trial court's failure to rule on both layers of hearsay;[39] objected to questions during *voir dire* of a juror, but did not move to strike any juror on that ground;[40] objected to evidence when it was first introduced, but did not object when the same evidence was later introduced;[41] or objected to evidence or argument, but did not request a curative instruction or mistrial.[42] A "motion to strike properly challenges only the sufficiency of the evidence offered up to that point, not the underlying admissibility of the evidence."[43] "[T]he reverse is also true: an objection to the admissibility of evidence cannot preserve the issue of the sufficiency of the evidence for appeal."[44]

2. **Be Timely**: "[T]ardy objections are the practical equivalent of no objection at all."[45] A litigant may not, in a motion to strike the evidence, "raise for the first time a question of admissibility of evidence."[46] A motion for a mistrial because of prejudicial statements made to a jury during opening arguments is not appropriate unless counsel objected to the statements when they were spoken.[47] Neither is a trial court required to issue a cautionary instruction or a mistrial *sua sponte* when a defendant fails to seek "prompt corrective action" for a prosecutor's alleged improper statements.[48] "An objection to a response to a jury question must be made during discussions between the trial court and counsel, prior to the response being submitted to the jury."[49] "[I]issues of venue may be waived,"[50] and must be raised in criminal trials before the verdict or finding of guilt.[51]

3. **Abandonment**: Even a timely objection is waived "if the record affirmatively shows that [a litigant] has abandoned the objection or has shown by his conduct the intent to abandon that objection."[52] Another "easy trap for the unwary" is the failure to ensure that "the record clearly reflects that counsel does not consider the original objection obviated by the opponent's attempt at corrective measures."[53]

4. **Futility is No Excuse**: Even "the fact that the law in effect at the time of a trial sets out a particular method for proceeding does not prevent a defendant from arguing that method *should be* different and does not excuse him from registering an objection in order to comply with Rule 5A:18."[54] "The perceived futility

of an objection does not excuse a defendant's procedural default at trial."[55]

B. **Make Proffers**: A proffer can be accomplished by an unchallenged avowal of counsel (if sufficiently specific), a stipulation of the evidence, testimony from a witness, written narrative summaries of the testimony, exhibits marked "refused," and the like.[56] If no proffer is made, the issue may be precluded on appeal.

1. **Evidence**: For instance, if the trial court sustains an objection to evidence, the objected-to evidence must be proffered to the trial court and become part of the record if it is to be considered on appeal. Courts "will not consider testimony excluded by the trial court without a proper showing of what that testimony might have been."[57] "When testimony is rejected before it is delivered, an appellate court has no basis for adjudication,"[58] and "we cannot competently determine error — much less reversible error — without a proper showing of what that testimony would have been."[59]

2. **Continuance Motions**: Continuance motions require a proffer of prejudice.[60] Continuance motions for absent witnesses require proffers that the witness's testimony will be material,[61] and that "it is likely that [he] would be present at a later date" to testify.[62]

3. **Requests for New Counsel**: It is the "appellant's burden to produce a record that includes the reasons presented to the trial court that justified his request for new counsel" and, because appellate courts "cannot speculate as to what appellant might have argued before the trial court," they consider only "the facts provided in the record."[63]

4. **Harm**: Because the "harmless error concept is no mere prudential, judge-made doctrine of appellate review,"[64] most cases require a proffer of harm. Code § 8.01-678 makes "harmless-error review required in *all* cases."[65] The harmless error statute "puts a limitation on the powers" of an appellate court "to reverse the judgment of the trial court — a limitation which we must consider on every application for an appeal and on the hearing of every case submitted to our judgment."[66] As a result, "[a]bsent a proffer showing harm was done," the appellate court is "forbidden to consider the question" if it cannot determine whether the error "prejudiced the proffering party."[67] The trial judge, however, cannot himself prevent a proffer[68] or prospectively find an incorrect ruling harmless.[69]

(a) Constitutional Harmless Error: The proffer for constitutional error must call into question the appellate court's ability to determine "that the error is harmless beyond a reasonable doubt."[70] Said differently, the reviewing court must be able to find some "reasonable possibility" that the error "might have contributed to the conviction."[71] Alleging an unpreserved constitutional challenge, however, is not enough to invoke the higher standard of harmless error review.[72]

(b) Other Harmless Error: For other errors, the proffer must show "the alleged error substantially influenced the jury" or the appellate court will find that the alleged "error is harmless."[73]

C. **Request Relief**: If the objection itself does not make the requested relief obvious, an "objecting party must expressly seek the action that it desires the judge to take."[74] Attempting to preserve a "right of appeal" by detailing the "particulars" of the objection without "asking [the court] at this time to change [its] ruling" may prove ineffectual.[75] A litigant who has merely "*questioned* the correctness" of the court's order but did not "expressly indicate the action that [he] wanted the trial court to take" cannot

subsequently argue on appeal that the trial court erroneously failed to take some required action.[76] This principle uniformly applies to: objections to seating jurors,[77] objections to the same evidence from different witnesses,[78] requests for cautionary instructions or mistrials,[79] objections alleging witness perjury,[80] and objections to irregularities in jury deliberations.[81]

D. **Avoid (and Object to) "Same Evidence"**: "It is well settled and obviously a sound general rule that an objection to evidence cannot be availed of by a party who has, at some other time during the trial, voluntarily elicited the same evidence, or has permitted it to be brought out by his adversary without objection."[82]

1. **Evidence brought in by the appellant**: That is, a litigant waives his objection to evidence when he offers evidence "dealing with the same subject as part of his own case-in-chief."[83]

2. **Evidence brought in by the opponent**: Waiver is also found where the objecting party fails to object to the same evidence when "*subsequently introduced by the opponent*."[84] This is true even if "precisely the same fact" was involved and the trial court had earlier rejected precisely the same objection.[85] The principle is "properly and logically applicable in any case, regardless of the order of introduction, if the party who has brought out the evidence in question, or who has permitted it to be brought out, can be fairly held responsible for its presence in the case."[86] The scope of the same-evidence principle includes the "same evidence" previously objected to,[87] evidence dealing "with the same subject,"[88] evidence fairly considered to be "of the same character,"[89] as well as evidence "similar to that to which the objection applies."[90]

E. **Renew Motions to Strike**: By "electing to introduce evidence in his defense, the defendant demonstrates 'by his conduct the intent to abandon' the argument that the Commonwealth failed to meet its burden through the evidence presented in its case-in-chief."[91] The defendant, therefore, "cannot rely on a previously made motion to strike, because any challenge to the sufficiency of the evidence, which includes evidence presented by the defense, will necessarily raise a new and distinct issue from the issue presented by the denied motion to strike."[92] Thus, a defendant waives a sufficiency objection under Rules 5:25 and 5A:18 when he fails to renew his motion to strike after presenting evidence on his own behalf,[93] or fails to make a motion to set aside the verdict.[94]

F. **Make Clear Sufficiency Challenges in Closing Arguments**: In a bench trial, Rule 5A:18 relaxes somewhat to permit a defendant to assert a sufficiency challenge in closing argument in addition to arguing the merits of the case.[95] "In light of the different arguments that the accused could present to the trial court," however, "Rule 5A:18 requires the accused to *specifically* raise a legal challenge to the sufficiency of the evidence in order to preserve that issue for appeal."[96] A "strained reading" of the "argument below will not suffice — [appellant] must have specifically challenged the sufficiency of the evidence" to preserve the issue for appeal.[97] "Not every closing argument accomplishes this objective."[98] A mere contest over the "weight of the evidence" favoring or disfavoring a conviction does not suffice.[99] "If arguments of this sort were adequate, the rule would be rendered meaningless; for every closing argument in a criminal case (short of a concession of guilt) does as much."[100]

G. **Request Rulings**: Failure to request a ruling from the trial court on objections, motions, and requests, including the appointment of a forensics expert,[101] pretrial motions,[102] double-tier hearsay,[103] the constitutionality of execution by lethal injection,[104] due process objections,[105] motions to set aside convictions,[106] and mistrials,[107] waives consideration of these arguments on appeal. Without a *ruling*, no error exists for appellate review.[108]

III. JURY INSTRUCTIONS

A. **Beware the "Law of this Case"**: An agreed-upon jury instruction — even if it imposes "an inappropriate standard" — becomes "the law of this case,"[109] and "is binding on the parties and this court."[110] Under this doctrine, a litigant cannot approve a jury instruction at trial and later complain on appeal that the instruction was "contrary to a position previously argued during trial,"[111] or that "the trial court erred in failing to rule as a matter of law on the issue"[112] or otherwise improperly issuing the instruction.[113]

B. **Take Responsibility for Instructions**: Though a trial court should not provide an incorrect instruction, the court is not required in civil cases "to correct or amend" an instruction that misstates the law or "is not supported by the evidence."[114] However, when an instruction incorrectly states a "principle of law [that] is materially vital to a defendant in a criminal case,"[115] omits "essential elements of the offense," or is not supported by any "evidence . . . relating to those elements,"[116] the ends-of-justice and good-cause exceptions to waiver may be implicated. There is no guarantee, however, that "the ends of justice exception" will always be applied "in cases involving faulty jury instructions to which no objection was noted below — even where such faulty instructions improperly stated the elements of an offense."[117]

C. **Request Proper Instructions**: A litigant cannot appeal the court's failure to provide an instruction that was never requested or proposed to the trial court,[118] except in the rare instance where the ends-of-justice exception applies.[119]

D. **Make a Proper Objection**: A complaint that an instruction was improperly refused is waived unless the proponent properly objects to the court's decision.[120] Waiver occurs where a party objects to a particular instruction but claims on appeal the instruction was wrong for a different reason.[121] A party cannot "complain about an error in an instruction given that is also contained in the instruction she proffered."[122]

E. **Don't Invite Error**: "[W]hen a litigant has knowledge of and is dissatisfied with a matter that occurred before verdict, he must object and call the court's attention to the matter at the time. The litigant is not allowed to remain silent, to take his chances of a favorable verdict, and, afterward, to raise an objection when he receives an unfavorable decision. By his silence, under such circumstances, the litigant is deemed to have waived the objection."[123] "Invited error" does not apply, however, where a party clearly objects to a prior ruling of the court,[124] even if the party does not "object to instructions applying or implementing the trial court's prior ruling."[125]

IV. FINAL ORDER

A. **Act Quickly in Response to Final Orders**: A trial court loses jurisdiction over the case after 21 days.[126] Once the trial court loses jurisdiction, a litigant may not raise any new

arguments.[127] While not a procedural default, the absence of a *final* order will in most cases prevent an appeal of a trial court decision.

B. **Don't Rely on "Seen and Objected to" Notation**: Except for objections barred because they should have been raised contemporaneously with the alleged error, objections noted on the Final Order usually suffice to preserve arguments for appeal.[128] A mere "seen and objected to" notation, however, is not enough.[129]

C. **Request Necessary Written Findings**: A party can waive (or lose by default) their statutory right to receive written findings by the court. Rule 5A:18 applies to written findings[130] unless the findings are necessary to explain a "non-conforming" child support award.[131]

V. Waiver On Appeal

A. **Be Timely**

1. A **Notice of Appeal** must be filed within 30 days[132] of the final order in the trial court or the Court of Appeals,[133] unless the appellate court finds good cause to grant an extension.[134]

2. **Transcripts** must be filed within 60 days of entry of the final order[135] and **Written Statements of Fact** must be filed within 55 days, absent an extension order from the appellate court.[136] "Within 10 days after the transcript is filed," counsel for appellant shall "give written notice to all other counsel" and any "failure to file the notice required by this Rule that materially prejudices an appellee will result in the affected transcripts being stricken from the record on appeal."[137]

3. A **Petition for Appeal** must be filed with the clerk of the Court of Appeals within 40 days of the *filing of the record*.[138]

4. **Opening Brief** and **Appendix**[139] must be filed within 40 days of the filing of the record in an appeal as of right or the granting of a discretionary appeal.[140]

B. **Note and Serve Proper Parties**: An appeal must be noted against the proper party.[141] In criminal cases, the choice of parties is limited to the Commonwealth or a locality when the conviction is for a violation of a local ordinance.[142] The failure of a party to identify the proper appellee in the notice of appeal is a procedural default and may result in dismissal of the appeal unless the failure is waived by the subsequent actions of the unnamed appellee (by participating on the merits of the appeal). This waiver by action only occurs if the appellant properly asserts it when the unnamed appellee lodges an objection for failure to name an indispensable party.[143] A recent opinion from the Virginia Supreme Court, *Michael E. Siska Revocable Trust v. Milestone Dev., LLC*, 282 Va. 169, 715 S.E.2d 21 (2011), clarified that the absence of a necessary party did not implicate subject matter jurisdiction but did give the court discretion to decline to hear the case.

C. **Assign Error**:[144] "Only those arguments presented in the petition for appeal and granted by this Court will be considered on appeal."[145] Appellant must "lay his finger on the error,"[146] noting "the specific ruling of the circuit court"[147] and "point[ing] out the errors with reasonable certainty" for which he is seeking reversal.[148] Issues not properly raised in the assignments of error will not be considered for appellate review.[149] "[F]ailure to strictly adhere to the requirements" may result in waiver of appellant's arguments on appeal.[150] Failing to challenge a trial court ruling on the initial appeal renders the trial court's ruling the law of the case and bars any

later challenge to that ruling on remand or in subsequent judicial proceedings.[151]

D. **Write a Supported Legal Brief**: "[W]ith respect to any assignments of error in the petition for appeal, the appellant shall include '[t]he principles of law, the argument, and the authorities relating to each assignment of error.' "[152] "Unsupported assertions of error 'do not merit appellate consideration.'"[153]

E. **Complete the Record**: For appellate consideration, "[i]t is the duty of the parties to provide us with a record sufficiently complete to support their legal arguments."[154]

F. **Designate the Appendix**: "The appendix must include 'any testimony and other incidents of the case germane to the questions presented,' Rule 5A:25(c)(3), and 'exhibits necessary for an understanding of the case that can reasonably be reproduced,' Rule 5A:25(c)(6)."[155] Since the "appendix is a tool vital to the function of the appellate process in Virginia," when it "does not contain parts of the record that are essential to the resolution of the issue before us, we will not decide the issue."[156] This default principle, however, appears to be entirely within the appellate court's discretion. "It will be assumed that the appendix contains everything germane to the assignments of error. The Court of Appeals may, however, consider other parts of the record." Rule 5A:25(h).

VI. Ends Of Justice

A. **Exception to Waiver**: The ends-of-justice exception to waiver does not apply simply because an appellant asserts a winning merits argument on the waived issue.[157] If that were so, procedural default "would never apply, except when it does not matter."[158]

1. **Ends-of-Justice Mirrors *sua sponte* Action**: Generally speaking, the adversarial model "is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief."[159] Trial courts should intervene, however, when failing to do so would result in a "grave injustice."[160]

2. **Defendants in Criminal Cases**: For application of the ends-of-justice exception, an appellant must prove he was convicted "for conduct that was not a criminal offense" — that is, the absence of both a jury instruction and evidentiary proof on an essential element makes it a "legal impossibility" for the defendant to have committed a crime — or that the evidence "affirmatively prove[d] that an element of the offense did not occur."[161] The ends of justice exception, however, is inapplicable where appellant "invited the error."[162]

3. **Civil Cases**: The ends-of-justice exception has been applied rarely in civil trials. One of the few examples is where the Virginia Supreme Court applied the exception when a trial court improperly gave full faith and credit to a non-final federal district court order.[163]

4. **Double Waiver**: For an appellant to avail himself of the exception, he must argue "ends of justice" or "good cause."[164] For appellate courts "will not consider, *sua sponte*, a 'miscarriage of justice' argument."[165]

VII. Waiver Rules Unique To Experts

A. Waiving Challenges to the Expert's Qualifications

1. **No Objection**: As with any other evidence, failing to object to an expert's

qualifications — even when the trial court has not formally qualified the witness as an expert or the witness has not expressed his credentials — waives any alleged error regarding the expert's qualifications.[166] "The law recognizes no 'degrees' of qualifications" for expert witnesses.[167] Thus, even if an unqualified expert renders opinion testimony without objection, the weight to be given to the opinion still remains subject to the jury's consideration.[168]

2. **Late Objection**: All issues of witness competency should be raised in a timely manner, "to protect the trial court from appeals based upon undisclosed grounds, to prevent the setting of traps on appeal, to enable the trial judge to rule intelligently, and to avoid unnecessary reversals and mistrials."[169] "The opponent must raise the objection as soon as the person is called to the stand, or, if possible, before the witness is called to testify. In an appropriate circumstance, the opponent may be able to object before the person is sworn as a witness. The opponent both objects and requests *voir dire* of the person concerning qualifications to be a witness."[170]

B. **Disclosures: Waiving the Opportunity to Present the Expert's Testimony**

1. **Federal Court**: To present expert testimony at trial, Federal Rule of Civil Procedure 26(a) requires litigants to produce specific information about their experts, including their identities[171] and a "detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor."[172] A failure to comply may prevent a party from using "on direct examination any expert testimony not so disclosed."[173]

(a) Timely Disclosures: Expert disclosures must be submitted "at the times and in the sequence that the court orders." In the absence of a court order, the disclosures must be given 90 days before the trial date or, in the case of a rebuttal expert, within 30 days of the opponent's expert disclosure.[174] Rule 26 also imposes a duty upon proponents of expert testimony to supplement an expert's report if new information arises.[175] Failure to supplement may result in exclusion of the new information at trial.[176]

(b) Harmless Error: As a general rule, the trial court will conduct a harmless error analysis to determine whether the party should be "permitted to use as evidence at trial . . . any witness or information not so disclosed."[177]

(c) Remedies: The Federal Rules of Civil Procedure vest broad discretion in the trial court to fashion an appropriate remedy in the event that the rules regarding expert disclosures are violated, such as limiting an undisclosed expert's testimony to lay opinion or firsthand knowledge,[178] overlooking a late filing,[179] or deferring its decision until more evidence is presented at a later stage of the trial.[180] The court may also order sanctions.[181]

2. **State Court**: Virginia rules, unlike the federal rules, place the initial burden of requesting advance notice of the experts' opinions on the opponent, not the proponent.[182]

(a) Interrogatories: Once interrogatories are propounded to a proponent, Virginia rules, like the federal rules, require the proponent to answer the interrogatories as they are posed to him,[183] and to supplement any information provided in the answers to interrogatories that is "incomplete or inaccurate" in a material way.[184] Each *specific* expert opinion must be disclosed in the interrogatory answers. The disclosure of

similar or related opinions will not cure a nondisclosure default. Similarly, an expert deposition addressing a nondisclosed opinion will not serve as a *de facto* supplement to an otherwise inadequate expert disclosure in the interrogatory answer.[185] As the Virginia Supreme Court explained, "a party is not relieved from its disclosure obligation under the Rule simply because the other party has some familiarity with the expert witness or the opportunity to depose the expert."[186] Along the same lines, an expert disclosure referring to a specific report that, inadvertently or not, was not attached to the interrogatory answer does not satisfy Rule 4:1(b)(4)(A)(i). Disclosing the "topic" but not the "substance" of the expert's opinion is insufficient.[187]

(b) Pretrial Scheduling Order: Virginia courts often use the pretrial scheduling order as a mechanism to ensure that expert information is provided and supplemented as required in a timely fashion.[188] The order not only sets deadlines for disclosing information about expert witnesses, "but also [requires disclosure of] the specifics of the expert's opinions and a summary of the factual grounds underlying these opinions."[189] The ultimate disclosure deadlines set forth in a pretrial scheduling order do not otherwise impact the normal discovery deadlines imposed by the Virginia Supreme Court's rules of discovery. Therefore, while the order imposes an absolute deadline, the discovery rules may require an earlier disclosure.[190] If a pretrial scheduling order exists and a party receives interrogatories specifically requesting expert disclosures, the party may waive the right to present its expert testimony if it fails to disclose its experts within the deadlines set by the pretrial scheduling order.[191] If no scheduling order exists, expert disclosures are handled under the normal discovery rules for responding to interrogatories.

(c) Remedies: When the opponent fails to respond to "an interrogatory submitted under Rule 4:8, . . . the discovering party may move for an order compelling an answer . . . ."[192] "[F]ailure to comply with [such an] order" may result in sanctions under Rule 4:12(b)(2).[193] "A litigant cannot avoid sanctions under Rule 4:12 by taking a nonsuit before the court can act on the defendant's motion for sanctions."[194] The trial court has wide discretion to determine an appropriate remedy,[195] including default judgment,[196] exclusion of the testimony, or issuing an order taking facts to be established, disallowing claims or defenses, or striking portions of pleadings.[197]

Endnotes

[1] The views advanced in this essay represent commentary "concerning the law, the legal system, [and] the administration of justice" as authorized by Virginia Canon of Judicial Conduct 4(B) (permitting judges to "speak, write, lecture, teach" and otherwise participate in extrajudicial efforts to improve the legal system). These views, therefore, should not be mistaken for the official views of the Virginia Court of Appeals or my opinion as an appellate judge in the context of any specific case.

[2] *Rahnema v. Rahnema*, 47 Va. App. 645, 658, 626 S.E.2d 448, 455 (2006).

[3] The introduction to this essay comes from a prior essay titled, "Procedural Defaults in Virginia Trial Courts: The Adversarial Model & The Imperative of Neutrality," 55 *Virginia Lawyer* 3, at 38 (Oct. 2006). The extensive outline of cases that follows comes mostly from the hard work of my law clerks, Shawn Daniel Lillemo, Kelley C. Holland, and Jennifer E. Bowen — to whom I offer my gratitude and praise.

[4] *Dabney v. Augusta Mut. Ins. Co*, 282 Va. 78, 86, 710 S.E.2d 726, 731 (2011) (citation omitted); *Bd. of Supervisors v. Robertson*, 266 Va. 525, 538, 587 S.E.2d 570, 578 (2003) (citation omitted); *see also Ted Lansing*

Supply Co. v. Royal Aluminum & Constr. Corp., 221 Va. 1139, 1141, 277 S.E.2d 228, 229-30 (1981) (citation omitted).

[5] *Va. Marine Res. Comm'n v. Clark*, 281 Va. 679, 686, 709 S.E.2d 150, 154 (2011) (citation omitted).

[6] 1 Charles E. Friend, *Virginia Pleading & Practice* § 23-5, at 738 (1998) (citing *Harrell v. Woodson*, 233 Va. 117, 353 S.E.2d 770 (1987)); 1 W. Hamilton Bryson, *Bryson on Virginia Civil Procedure* § 6.02 (4th ed. 2005).

[7] *Harrell v. Harrell*, 272 Va. 652, 656-57, 636 S.E.2d 391, 394 (2006) (applying Code § 20-79(b)); *Fadness v. Fadness*, 52 Va. App. 833, 843, 667 S.E.2d 857, 862 (2008); *Reid v. Reid*, 24 Va. App. 146, 150, 480 S.E.2d 771, 773 (1997); *Boyd v. Boyd*, 2 Va. App. 16, 18-19, 340 S.E.2d 578, 580 (1986). *Accord Fleming v. Fleming*, 32 Va. App. 822, 826, 531 S.E.2d 38, 40 (2000) (citing *Boyd*, 2 Va. App. at 17-18, 340 S.E.2d at 579).

[8] *Ted Lansing Supply Co.*, 221 Va. at 1142, 277 S.E.2d at 230 (citing *Bolling v. Acceptance Corp.*, 204 Va. 4, 9, 129 S.E.2d 54, 57-58 (1963)) (finding the trial court could not enter judgment on an "implied warranty theory" where the pleadings alleged only a breach of express warranty).

[9] Kent Sinclair & Leigh B. Middleditch, Jr., *Virginia Civil Procedure* § 8.1(A), at 622 (5th ed. 2008) (citing *Tuscarora, Inc. v. B.V.A. Credit Corp.*, 218 Va. 849, 241 S.E.2d 778 (1978).

[10] *City of Norfolk v. Vaden*, 237 Va. 40, 44, 375 S.E.2d 730, 732-33 (1989) (reversing the trial court's verdict premised upon contractual obligations — an issue not raised by the pleadings).

[11] *Lee v. Lambert*, 200 Va. 799, 803, 108 S.E.2d 356, 358-59 (1959) (noting that a trial court's granting of recovery based in *quantum meruit*, when not pled or requested, erroneously permits recovery on a "different contract from the one alleged in the pleadings").

[12] *Laughlin v. Morauer*, 849 F.2d 122, 126 (4th Cir. 1988) (finding collateral estoppel or *res judicata* inapplicable because a trial court's specific ruling that there was no public easement was not binding when the parties did not include the public easement issue in the pleadings).

[13] *Jenkins v. Bay House Assocs.*, 266 Va. 39, 43-44, 581 S.E.2d 510, 512-13 (2003) (limiting plaintiffs' trespass claims to those pertaining to encroachment on land because the pleadings "did not contain any assertions" that the trespass occurred on their waters).

[14] *See, e.g., Matney v. McClanahan*, 197 Va. 454, 458, 90 S.E.2d 128, 130-31 (1955) (finding a complaint containing inadequate descriptions of contested property to be defaulted).

[15] *Bank of Giles Cnty. v. Mason*, 199 Va. 176, 181-83, 98 S.E.2d 905, 909 (1957) (dismissing a petition for writ of mandamus to inspect corporate records where complainant failed to "allege any previous request for such an inspection, . . . offered no proof of such request nor was there any suggestion in their evidence as to what they wanted to inspect nor any reason given for such an inspection").

[16] *Bd. of Supervisors v. Robertson*, 266 Va. 525, 538, 587 S.E.2d 570, 578 (2003) (ruling a court may not interpret zoning ordinances in a manner not pleaded by either party).

[17] *Ford Motor Co. v. Benitez*, 273 Va. 242, 252, 639 S.E.2d 203, 208 (2007) (citation omitted); *see* Va. Sup. Ct. Rule 1:8 ("Leave to amend shall be liberally granted in furtherance of the ends of justice.").

[18] *Powell v. Sears, Roebuck & Co.*, 231 Va. 464, 467, 344 S.E.2d 916, 917 (1986).

[19] W. Hamilton Bryson, *Bryson on Virginia Civil Procedure* 266 (3d ed. 1997).

[20] John L. Costello, *Virginia Remedies* § 6.07[2], at 6-17 (3d ed. 2005).

[21] Kent Sinclair, *Guide to Virginia Law & Equity Reform & Other Landmark Changes* § 7.05, at 175 (2006). *See* Va. Sup. Ct. Rule 3:8(a) ("An answer shall respond to the paragraphs of the complaint. A general denial of the entire complaint or plea of the general issue shall not be permitted.")

[22] Kent Sinclair, *Guide to Virginia Law & Equity Reform & Other Landmark Changes* § 8.04, at 204 (2006).

[23] Rule 3:18(c); *see Eiss v. Lillis*, 233 Va. 545, 357 S.E.2d 539 (1987).

[24] *Jones v. Jones*, 249 Va. 565, 571-72, 457 S.E.2d 365, 369 (1995); Code § 8.01-235; Va. Sup. Ct. Rule 3:18(d).

[25] *Perk v. Vector Res. Grp.*, 253 Va. 310, 317, 485 S.E.2d 140, 144 (1997) (citing Code § 8.01-264).

[26] Uniform Pretrial Scheduling Order, Va. Sup. Ct. Rule 1:18(B), Form 3 (2000) (emphasis added).

[27] *Kirk Timber & Farming Co. v. Union Camp Corp.*, 56 Va. Cir. 335, 341-42 (2001) (citations omitted).

[28] *See* Va. Sup. Ct. Rule 3:8(a).

[29] *See* Uniform Pretrial Scheduling Order (emphasis added).

[30] Rule 3A:9(b)(1). Such motions "shall be filed or made before a plea is entered and, in a circuit court, at least 7 days" before trial. Rule 3A:9(c). "The motion shall include all such defenses and objections then available to the accused. Failure to present any such defense or objection as herein provided shall constitute a waiver thereof." *Harris v. Commonwealth*, 39 Va. App. 670, 674, 576 S.E.2d 228, 230 (2003) (*en banc*) (quoting Rule 3A:9(b)(1)).

[31] Code §19.2-266.2(B) (requiring such motions be written and filed no later than seven days before trial).

[32] *Riner v. Commonwealth*, 268 Va. 296, 310, 601 S.E.2d 555, 562 (2004).

[33] *Thomas v. Commonwealth*, 44 Va. App. 741, 750, 607 S.E.2d 738, 742, *adopted on reh'g en banc*, 45 Va. App. 811, 613 S.E.2d 870 (2005); *see Kelly v. Commonwealth*, 42 Va. App. 347, 354, 592 S.E.2d 353, 356 (2004) ("A trial court must be alerted to the precise 'issue' to which a party objects." (citation omitted)).

[34] *Nusbaum v. Berlin*, 273 Va. 385, 402-03, 641 S.E.2d 494, 503 (2007) (citation omitted).

[35] *Kovalaske v. Commonwealth*, 56 Va. App. 224, 229-30, 692 S.E.2d 641, 645 (2010) (holding "a general objection to the sufficiency of the evidence" did not preserve "the issue of whether the evidence was insufficient to prove a particular [unmentioned] element of the offense"); *Bowling v. Commonwealth*, 51 Va. App. 102, 106, 654 Va. App. 354, 356 (2007) (holding an argument "that Code § 19.2-128(B) did not apply" does not raise "the sufficiency of the evidence to prove that [appellant] had notice").

[36] *Cherrix v. Commonwealth*, 257 Va. 292, 308 n.3, 513 S.E.2d 642, 652 n.3 (1999) ("To the extent that he attempts to make this argument, however, it is defaulted because he did not object to Dr. Bulette's appointment on any constitutional basis at trial. Rule 5:25. Therefore, we address only his statutory argument.").

[37] *Roadcap v. Commonwealth*, 50 Va. App. 732, 741-42, 653 S.E.2d 620, 625 (2007) (addressing only Confrontation Clause argument because "[appellant] conceded during oral argument on appeal that trial counsel did not make th[e] statutory argument at trial").

[38] *Lloyd v. Kime*, No. 100091, slip op. at 4 (Va. Apr. 1, 2011), *available at* http://valawyersweekly.com/?scovablog/files/2011/04/lloyd-timothy-4-1-11-by-order.pdf. Note that unpublished Virginia Supreme Court orders have precedential effect if the Court provides the legal analysis for its ruling. *See Sheets v. Castle*, 263 Va. 407, 411-12, 559 S.E.2d 616, 619 (2002).

[39] *Riner v. Commonwealth*, 268 Va. 296, 325, 601 S.E.2d 555, 571 (2004) ("[B]y failing to bring to the trial court's attention the fact that it had ruled only on the admissibility of the primary hearsay in the statement, Riner did not afford the trial court the opportunity to rule intelligently on the issue [of secondary hearsay].")

[40] *See, e.g., Joseph v. Commonwealth*, 249 Va. 78, 83, 452 S.E.2d 862, 866 (1995); *Mu'Min v. Commonwealth*, 239 Va. 433, 445 n.6, 389 S.E.2d 886, 894 n.6 (1990), *aff'd*, 500 U.S. 415 (1991).

[41] *See* "Avoid (and Object to) 'Same Evidence,'" *infra*, p. 6.

[42] *See* "Request Rulings," *infra*, p.7.

[43] *Arrington v. Commonwealth*, 53 Va. App. 635, 642, 674 S.E.2d 554, 557 (2009) (quoting *McCary v. Commonwealth*, 36 Va. App. 27, 40, 548 S.E.2d 239, 245 (2001)).

[44] *Bowling v. Commonwealth*, 51 Va. App. 102, 106, 654 S.E.2d 354, 356 (2007).

[45] Charles E. Friend, *The Law of Evidence in Virginia* §8-4, at 295 (6th ed. 2003).

[46] *Bitar v. Rahman*, 272 Va. 130, 140, 630 S.E.2d 319, 325 (2006) (citations omitted); *see also Banks v. Mario Indus.*, 274 Va. 438, 456, 650 S.E.2d 687, 697 (2007) (the "evidence was admitted without objection and the question of admissibility of this evidence is not the proper subject of a motion to strike").

[47] *See, e.g., Beavers v. Commonwealth*, 245 Va. 268, 279, 427 S.E.2d 411, 419 (1993) (objection and motion for mistrial was untimely when made after several allegedly prejudicial statements had already been uttered); *Yeatts v. Commonwealth*, 242 Va. 121, 137, 410 S.E.2d 254, 264 (1991) (motion for mistrial based on judge's disposition of an earlier objection was untimely because the objection and the judge's disposition occurred the day before the motion for mistrial). *Cf. Angel v. Commonwealth*, 281 Va. 248, 271-72, 704 S.E.2d

386, 400 (2011) (defendant's request for a mistrial was not untimely where it was made "as soon as the jury left the courtroom to begin deliberations" where he had "continued" his earlier objection and made "[n]o further argument of substantive proceeding between the objection and the motion").

[48] *Cheng v. Commonwealth*, 240 Va. 26, 40, 393 S.E.2d 599, 606-07 (1990).

[49] *Ludwig v. Commonwealth*, 52 Va. App. 1, 10, 660 S.E.2d 679, 683 (2008).

[50] *Gheorghiu v. Commonwealth*, 280 Va. 678, 689, 701 S.E.2d 407, 414 (2010); *see, e.g., United States v. Dabbs*, 134 F.3d 1071, 1078 (11th Cir. 1998); *United States v. Turley*, 891 F.2d 57, 61 (3d Cir. 1989); *United States v. Winship*, 724 F.2d 1116, 1124 (5th Cir. 1984).

[51] Code § 19.2-244.

[52] *Graham v. Cook*, 278 Va. 233, 248, 682 S.E.2d 535, 543 (2009); *see Helms v. Manspile*, 277 Va. 1, 6, 671 S.E.2d 129, 129 (2009).

[53] Charles E. Friend, *The Law of Evidence in Virginia* § 8-4, at 295 (6th ed. 2003).

[54] *Riner v. Commonwealth*, 40 Va. App. 440, 456, 579 S.E.2d 671, 679 (2003) (emphasis added), *aff'd*, 268 Va. 296, 601 S.E.2d 555 (2004).

[55] *McGhee v. Commonwealth*, 280 Va. 620, 625, 701 S.E.2d 58, 60-61 (2010) (quoting in parenthetical *Commonwealth v. Jerman*, 263 Va. 88, 94, 556 S.E.2d 754, 757 (2002)).

[56] *See Whittaker v. Commonwealth*, 217 Va. 966, 969, 234 S.E.2d 79, 81 (1977).

[57] *Commonwealth Transp. Comm'r v. Target Corp.*, 274 Va. 341, 348, 650 S.E.2d 92, 96 (2007) (citations and internal quotation marks omitted); *see Holles v. Sunrise Terrace, Inc.*, 257 Va. 131, 135, 509 S.E.2d 494, 497 (1999) ("When testimony is excluded before it is presented, the record must reflect a proper proffer showing what the testimony would have been." (citation omitted)).

[58] *Chappell v. Va. Elec. & Power Co.*, 250 Va. 169, 173, 458 S.E.2d 282, 285 (1995) (citations omitted).

[59] *Ray v. Commonwealth*, 55 Va. App. 647, 649-50, 688 S.E.2d 879, 880-81 (2010) (citations and internal quotation marks omitted); *see Tynes v. Commonwealth*, 49 Va. App. 17, 21, 635 S.E.2d 688, 689-90 (2006) ("Such a proffer allows us to examine both the admissibility of the proposed testimony, and whether, even if admissible, its exclusion prejudiced the proffering party." (citation and internal quotation marks omitted)); *Molina v. Commonwealth*, 47 Va. App. 338, 367-68, 624 S.E.2d 83, 97, *aff'd*, 272 Va. 666, 636 S.E.2d 470 (2006) ("The failure to proffer the expected testimony is fatal to his claim on appeal."). *See generally* Boyd-Graves Conference, *A Guide to Evidence in Virginia* § 103, at 3-6 (2011); FED. R. EVID. 103.

[60] "An appellate court can reverse only if the trial court committed an 'abuse of discretion' *and* thereby caused 'resulting prejudice.'" *Cooper v. Commonwealth*, 54 Va. App. 558, 565, 680 S.E.2d 361, 364 (2009) (emphasis in original) (citation omitted). "This 'two-pronged' test . . . has long been the standard under Virginia practice." *Id.* (quoting *Lebedun v. Commonwealth*, 27 Va. App. 697, 712, 501 S.E.2d 427, 434 (1998)); *see also Silcox v. Commonwealth*, 32 Va. App. 509, 513, 528 S.E.2d 744, 746 (2000).

[61] *Stewart v. Commonwealth*, 10 Va. App. 563, 569, 394 S.E.2d 509, 513 (1990) (court denied motion for continuance based on defendant's "speculation" that missing witness might be potentially valuable).

[62] "The burden is on the party seeking a continuance to show that it is likely that the witness would be present at a later date and would testify in the manner indicated in the proffer." *Chichester v. Commonwealth*, 248 Va. 311, 322, 448 S.E.2d 638, 646 (1994) (citations omitted).

[63] *Brailey v. Commonwealth*, 55 Va. App. 435, 445, 686 S.E.2d 546, 551 (2009).

[64] *Kirby v. Commonwealth*, 50 Va. App. 691, 699, 653 S.E.2d 600, 604 (2007).

[65] *Ferguson v. Commonwealth*, 240 Va. ix, ix, 396 S.E.2d 675, 675 (1990) (emphasis in original and text in parenthetical to statutory citation).

[66] *Walker v. Commonwealth*, 144 Va. 648, 652, 131 S.E. 230, 231 (1926).

[67] *Montgomery v. Commonwealth*, 56 Va. App. 695, 703, 696 S.E.2d 261, 264 (2010) (citations and internal quotation marks omitted).

[68] *Brown v. Commonwealth*, 246 Va. 460, 465, 437 S.E.2d 563, 565 (1993) (reversing appellant's conviction because "Brown tried to make a proffer, but the trial court did not permit him to do so").

[69] "The harmless error doctrine is applicable only upon appellate review or in the trial court upon consideration of a motion to set aside a verdict." *Hackney v. Commonwealth*, 28 Va. App. 288, 296, 504 S.E.2d 385, 389 (1998) (*en banc*). It "should not be used prospectively by a trial court as a basis to disregard an established rule of law." *Id.*; *see also Purvis v. Commonwealth*, 31 Va. App. 298, 309-10, 522 S.E.2d 898, 903-04 (2000) (same).

[70] *Pitt v. Commonwealth*, 260 Va. 692, 695, 539 S.E.2d 77, 78 (2000).

[71] *Id.*

[72] *Harrison v. Commonwealth*, 56 Va. App. 382, 389, 694 S.E.2d 247, 250 (2010) (finding "we are guided by Virginia's harmless error statute" because appellant failed to "raise the issue of constitutional error at the trial level").

[73] *Id.* (quoting *Clay v. Commonwealth*, 262 Va. 253, 259, 546 S.E.2d 728, 731 (2001)).

[74] *Bennett v. Commonwealth*, 29 Va. App. 261, 280, 511 S.E.2d 439, 448 (1999); *see also Thomas v. Commonwealth*, 44 Va. App. 741, 751 n.2, 607 S.E.2d 738, 742 n.2 (finding a timely motion for mistrial or a cautionary instruction is needed even if an objection to improper conduct was properly lodged), *adopted upon reh'g en banc*, 45 Va. App. 811, 613 S.E.2d 870 (2005); *Morris v. Commonwealth*, 14 Va. App. 283, 287, 416 S.E.2d 462, 464 (1992) (*en banc*) (same).

[75] *See Nusbaum v. Berlin*, 273 Va. 385, 404, 641 S.E.2d 494, 504 (2007) ("Nusbaum's counsel did not just fail to remind the circuit court that it had not yet ruled on his due process objections; he actually stated, on more than one occasion, that he was not asking the court to reconsider any ruling.").

[76] *Widdifield v. Commonwealth*, 43 Va. App. 559, 563, 600 S.E.2d 159, 161-62 (2004) (*en banc*) (emphasis in original).

[77] A party who unsuccessfully objects to rulings made during the *voir dire* of a prospective juror has no appellate complaint as to that juror unless he specifically asked the trial court to strike that juror. *See, e.g., Joseph v. Commonwealth*, 249 Va. 78, 83, 452 S.E.2d 862, 866 (1995); *Mu'Min v. Commonwealth*, 239 Va. 433, 445 n.6, 389 S.E.2d 886, 894 n.6 (1990); *Spencer v. Commonwealth*, 238 Va. 295, 306-07, 384 S.E.2d 785, 793 (1989). Furthermore, "[t]he fact that Rule 3A:14(b) authorizes a trial court to excuse a juror for cause on its own motion does not relieve a defendant from complying with the requirements of Rule 5:25." *Green v. Commonwealth,* 266 Va. 81, 101, 580 S.E.2d 834, 845 (2003).

[78] Thus, an unsuccessful objection "to the admissibility of certain evidence [is] waived by the failure to object to the same evidence subsequently introduced." *Philip Greenberg, Inc. v. Dunville*, 166 Va. 398, 404, 185 S.E. 892, 894 (1936).

[79] A party who unsuccessfully objects to evidence cannot appeal on the ground that the trial court failed to give a cautionary instruction unless he asked the trial court to give one. *Largin v. Commonwealth*, 215 Va. 318, 321, 208 S.E.2d 775, 777 (1974). *See also Andrews v. Commonwealth*, 280 Va. 231, 302, 699 S.E.2d 237, 278 (2010) (noting improper prosecutorial comments or misconduct during closing argument may not be considered on appeal as a basis for reversal where defendant failed to "timely object, timely ask for a cautionary instruction, or timely move for a mistrial"); *Berry v. Commonwealth*, 22 Va. App. 209, 214, 468 S.E.2d 685, 687-88 (1996) ("The failure to request a cautionary instruction bars consideration of the issue on appeal.").

[80] A defendant's notice to the court that a witness has likely perjured herself is not tantamount to asking the court for a mistrial, an order, or "any specific remedy." *Elliott v. Commonwealth*, 267 Va. 396, 422, 593 S.E.2d 270, 286 (2004).

[81] A party cannot appeal the trial court's failure to take specific action in response to an "irregularity of the jury" deliberations unless the party asked the trial court to do something about it. *Parker v. Commonwealth*, 14 Va. App. 592, 596, 421 S.E.2d 450, 453 (1992).

[82] *Carter v. Pickering*, 191 Va. 801, 808, 62 S.E.2d 856, 808 (1951) (citation omitted).

[83] *Pettus v. Gottfried*, 269 Va. 69, 79, 606 S.E.2d 819, 825 (2005) (citing *Drinkard-Nuckols v. Andrews*, 269 Va. 93, 102-03, 606 S.E.2d 813, 819 (2005)); *Isaac v. Commonwealth*, 58 Va. App. 255, 708 S.E.2d 435 (2011).

[84] Charles E. Friend, *The Law of Evidence in Virginia* § 8-4, at 295 (6th ed. 2003) (emphasis in original).

[85] *Philip Greenberg, Inc. v. Dunville*, 166 Va. 398, 404, 185 S.E. 892, 894 (1936); *see also Portner v. Portner's Ex'rs*, 133 Va. 251, 263, 112 S.E. 762, 766 (1922) (holding that, "if it had been error to admit [the

challenged evidence] in the first place, subsequent introduction of the same evidence without objection constituted a waiver of the previous objection").

[86] *Pettus*, 269 Va. at 79, 606 S.E.2d at 825 (quoting *Whitten v. McClelland*, 137 Va. 726, 741, 120 S.E. 146, 150 (1923)).

[87] *See New York Life Ins. Co. v. Taliaferro*, 95 Va. 522, 523, 28 S.E. 879, 879 (1898); *see also Snarr v. Commonwealth*, 131 Va. 814, 818, 109 S.E. 590, 592 (1921); *Moore Lumber Corp. v. Walker*, 110 Va. 775, 778, 67 S.E. 374, 375 (1910).

[88] *Pettus*, 269 Va. at 79, 606 S.E.2d at 825 (citation omitted).

[89] *Combs v. Norfolk & W. Ry. Co.*, 256 Va. 490, 499, 507 S.E.2d 355, 360 (1998).

[90] *Snead v. Commonwealth*, 138 Va. 787, 802, 121 S.E. 82, 86 (1924) (citation omitted).

[91] *Murillo-Rodriguez v. Commonwealth*, 279 Va. 64, 83, 688 S.E.2d 199, 209 (2010) (citation omitted).

[92] *United Leasing Corp. v. Lehner Family Bus. Trust*, 279 Va. 510, 517, 689 S.E.2d 670, 673-74 (2010) (citation omitted).

[93] *Wilder v. Commonwealth*, 55 Va. App. 579, 594, 687 S.E.2d 542, 549 (2010); *McQuinn v. Commonwealth*, 20 Va. App. 753, 756, 460 S.E.2d 624, 626 (1995) (*en banc*).

[94] *Delaney v. Commonwealth*, 55 Va. App. 64, 67, 683 S.E.2d 834, 835 (2009); *Howard v. Commonwealth*, 21 Va. App. 473, 478, 465 S.E.2d 142, 144 (1995). *See also Gabbard v. Knight*, 202 Va. 40, 43, 116 S.E.2d 73, 75 (1960) ("While a motion to strike is an appropriate way of testing the sufficiency of relevant evidence to sustain an adverse verdict, it is not the only way. It has long been the practice in this jurisdiction to test the sufficiency of such evidence by a motion to set aside the verdict.").

[95] *See Copeland v. Commonwealth*, 42 Va. App. 424, 441, 592 S.E.2d 391, 399 (2004); *Campbell v. Commonwealth*, 12 Va. App. 476, 480-81, 405 S.E.2d 1, 2-3 (1991) (*en banc*).

[96] *Dickerson v. Commonwealth*, 58 Va. App. 351, 357, 709 S.E.2d 717, 720 (2011) (emphasis in original).

[97] *Scott v. Commonwealth*, 58 Va. App. 35, 46, 707 S.E.2d 17, 22 (2011).

[98] *Campbell*, 12 Va. App. at 481, 405 S.E.2d at 3 (*cited in Murillo-Rodriguez v. Commonwealth*, 279 Va. 64, 75 n.4, 688 S.E.2d 199, 205 n.4 (2010)).

[99] *Id.*

[100] *Jarvis v. Commonwealth*, No. 1634-04-1, 2005 Va. App. LEXIS 415, at *4 (Oct. 18, 2005).

[101] *Juniper v. Commonwealth*, 271 Va. 362, 383-84, 626 S.E.2d 383, 398 (2006).

[102] *Williams v. Commonwealth*, 57 Va. App. 341, 347, 702 S.E.2d 260, 263 (2010); *Lenz v. Commonwealth*, 261 Va. 451, 463, 544 S.E.2d 299, 306, cert. denied, 534 U.S. 1003 (2001).

[103] *Riner v. Commonwealth*, 268 Va. 296, 323-25, 601 S.E.2d 555, 571-72 (2004).

[104] *Morva v. Commonwealth*, 278 Va. 329, 341, 683 S.E.2d 553, 559 (2009).

[105] *Nusbaum v. Berlin*, 273 Va. 385, 403, 641 S.E.2d 494, 503 (2007).

[106] *Schwartz v. Commonwealth*, 41 Va. App. 61, 71, 581 S.E.2d 891, 896 (2003*), aff'd on other grounds*, 267 Va. 751, 594 S.E.2d 925 (2004).

[107] *Taylor v. Commonwealth*, 208 Va. 316, 324, 157 S.E.2d 185, 191 (1967).

[108] *Schwartz*, 41 Va. App. at 71, 581 S.E.2d at 896 ("[T]he circuit court never ruled upon his motion to set aside the convictions, providing us no ruling to review on appeal."); *see also Hodnett v. Stanco Masonry*, 58 Va. App. 244, 254, 708 S.E.2d 429, 435 (2011) ("We cannot consider alleged error on a ruling the commission never made."); *Ohree v. Commonwealth*, 26 Va. App. 299, 308, 494 S.E.2d 484, 489 (1998); *Fisher v. Commonwealth*, 16 Va. App. 447, 454, 431 S.E.2d 886, 890 (1993) (When appellant "failed to obtain a ruling," he "was denied nothing by the trial court, [and] there is no ruling for us to review.").

[109] *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 136, 413 S.E.2d 630, 635 (1992).

[110] *Miles v. Commonwealth*, 205 Va. 462, 468, 138 S.E.2d 22, 27 (1964); *see also Wintergreen Partners, Inc. v. McGuireWoods, LLP*, 280 Va. 374, 379, 698 S.E.2d 913, 916 (2010) (quoting *Owens-Illinois, Inc. v.*

Thomas Baker Real Estate, Ltd., 237 Va. 649, 652, 379 S.E.2d 344, 346 (1989); *Med. Ctr. Hosps. v. Sharpless*, 229 Va. 496, 498, 331 S.E.2d 405, 406 (1985); *Hilton v. Fayen*, 196 Va. 860, 867, 86 S.E.2d 40, 43 (1955) ("Right or wrong, the instruction given in this case became the law of the case on that point, and was binding upon both the parties and the jury.").

[111] *WJLA-TV v. Levin*, 264 Va. 140, 159, 564 S.E.2d 383, 395 (2002).

[112] *Holles v. Sunrise Terrace, Inc.*, 257 Va. 131, 137-38, 509 S.E.2d 494, 498 (1999).

[113] *See id.; see also* Charles E. Friend, *The Law of Evidence in Virginia* § 1-4, at 15 (6th ed. 2003) ("Normally, when a party proffers or agrees to an instruction that is contrary to the position taken during trial, the agreed instruction becomes the law of the case, and the party is deemed to have waived any objection to a prior ruling."); W. Hamilton Bryson, *Bryson on Virginia Civil Procedure* 449 (3d ed. 1997) ("A party cannot object to the giving of an instruction that he himself requested unless it is given in an amended form.").

[114] *Honsinger v. Egan*, 266 Va. 269, 275, 585 S.E.2d 597, 601 (2003) ("In a civil trial, the burden is on the parties to furnish the trial court with proper and appropriate instructions that address their respective theories of the case.").

[115] *Fishback v. Commonwealth*, 260 Va. 104, 117, 532 S.E.2d 629, 635 (2000) (quoting *Whaley v. Commonwealth*, 214 Va. 353, 355-56, 200 S.E.2d 556, 558 (1973)). *See Humphrey v. Commonwealth*, 37 Va. App. 36, 51, 553 S.E.2d 546, 553 (2001) (holding trial court had "affirmative duty" to correct erroneous instruction regarding defendant's "sole defense").

[116] *Bazemore v. Commonwealth*, 42 Va. App. 203, 219, 590 S.E.2d 602, 610 (2004) (quoting *Jimenez v. Commonwealth*, 241 Va. 244, 251, 402 S.E.2d 678, 681-82 (1991)).

[117] *Id.* at 219-20, 590 S.E.2d at 610 (citation omitted).

[118] Rule 5:25; Rule 5A:18; *see, e.g., Blanton v. Commonwealth*, 280 Va. 447, 454, 699 S.E.2d 279, 283 (2010) (finding appellant did not ask for cautionary instruction and, thus, "waived any claim of error she may have had"); *Cherrix v. Commonwealth*, 257 Va. 292, 311, 513 S.E.2d 642, 654 (1999) (holding appellant's "failure to proffer a parole eligibility instruction . . . precludes us from addressing the merits of this assignment of error"); *Pearce v. Commonwealth*, 53 Va. App. 113, 124, 669 S.E.2d 384, 390 (2008) (appellant's failure to request limiting instruction waived his "right on appeal to argue his entitlement to such an instruction"); *Thomas v. Commonwealth*, 44 Va. App. 741, 743, 607 S.E.2d 738, 751, *adopted upon reh'g en banc*, 45 Va. App. 811, 613 S.E.2d 870 (2005) (noting that, "by refusing the trial court's offer of a cautionary instruction and by not proposing one of his own, [appellant] waived any claim of error associated with that issue"); *Bazemore*, 42 Va. App. at 214-15, 590 S.E.2d at 607-08 (appellant's failure to ask for instruction on the definition of "wanton" precluded review of "the issue for the first time on appeal"); *see also Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 448 (4th Cir. 2001) (holding party's failure to request instruction on alternate theory barred appeal based on that theory); *United States v. Carroll*, 710 F.2d 164, 169 n.2 (4th Cir. 1983) (holding objection to omitted instruction waived where defendant "failed to request such an instruction").

[119] *Alford v. Commonwealth*, 56 Va. App. 706, 710, 696 S.E.2d 266, 268 (2010) ("The combination of a flawed or missing jury instruction and the failure of the evidence to prove an essential element triggers the ends-of-justice exception to Rule 5A:18." (citation omitted)); *Campbell v. Commonwealth*, 14 Va. App. 988, 994, 421 S.E.2d 652, 656 (1992) (*en banc*) ("When an instruction allows a jury to convict a defendant without proof of an essential and necessary element of the charged offense, the Commonwealth is not entitled to an appellate affirmance based solely on application of Rule 5A:18.")

[120] *See Breard v. Commonwealth*, 248 Va. 68, 83, 445 S.E.2d 670, 679 (1994) (explaining defendant waived allegation of error by failing to object to the denial of his proposed instruction).

[121] *Gazette, Inc. v. Harris*, 229 Va. 1, 26, 325 S.E.2d 713, 732 (1985) (holding defendant's trial objection to instruction regarding "damage to reputation" did not preserve appeal based on "injury to business," referenced in same instruction).

[122] *Thomas v. Commonwealth*, 279 Va. 131, 167, 688 S.E.2d 220, 240 (2010). *See Gaines v. Commonwealth,* 39 Va. App. 562, 568, 574 S.E.2d 775, 778 (2003) (*en banc*) ("The defendant's instruction was no more or less correct than the instruction given.").

[123] *Hurt v. Newcomb*, 242 Va. 36, 39, 405 S.E.2d 843, 844 (1991).

[124] *Wright v. Norfolk & W. Ry. Co.*, 245 Va. 160, 170, 427 S.E.2d 724, 729 (1993) (no "invited error" where defendant did not object to contributory negligence instruction but renewed motion to strike on

contributory negligence grounds); *Torian v. Torian*, 38 Va. App. 167, 175-76, 562 S.E.2d 355, 359-60 (2002) (holding the trial court was not bound by "law of the case" where the parties "informed the trial court of their disagreement").

[125] *King v. Commonwealth*, 264 Va. 576, 582, 570 S.E.2d 863, 866 (2002). *See McMinn v. Rounds*, 267 Va. 277, 281, 591 S.E.2d 694, 697 (2004) (no waiver where plaintiff's counsel made numerous objections, but responded "That's fine, Your Honor" to amended instruction); *WJLA-TV v. Levin*, 264 Va. 140, 159, 564 S.E.2d 383, 395 (2002) (no waiver where party objected to trial court's ruling but included clear statement of the ruling in jury instruction); *Wiggins v. Commonwealth*, 47 Va. App. 173, 182, 622 S.E.2d 774, 778 (2005); *see also* Charles E. Friend, *The Law of Evidence in Virginia* § 1-4, at 15 (6th ed. 2003).

[126] "All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." Rule 1:1.

[127] Rules 5:25 & 5A:18.

[128] Code § 8.01-384(A); *Brown v. Commonwealth*, 279 Va. 210, 217, 688 S.E.2d 185, 189 (2010); *Lee v. Lee*, 12 Va. App. 512, 516, 404 S.E.2d 736, 738 (1991) (*en banc*) (noting "counsel may, if he or she has previously failed to do so, include an objection and reasons therefor in the final order or at least tender such an order to the trial judge" (citing *Highway Comm'r v. Easley*, 215 Va. 197, 207 S.E.2d 870 (1974)).

[129] *Lee*, 12 Va. App. at 515, 404 S.E.2d at 737-38 (finding that neither Code § 8.01-384 nor Rule 5A:18 is "complied with merely by objecting generally to an order" as in stating the order is "seen and objected to"); *Staples v. Staples*, No. 2804-05-1, 2006 Va. App. LEXIS 230, at *5 (Apr. 18, 2006) ("this Court has held that merely endorsing a final order as 'seen and excepted to for all reasons stated in the record' is insufficient, standing alone, to preserve a particular issue for appeal." (citing *Courembis v. Courembis*, 43 Va. App. 18, 26, 595 S.E.2d 505, 509 (2004))). Such a notation is insufficient unless "the ruling made by the trial court was narrow enough to make obvious the basis of appellant's objection" to it. *Mackie v. Hill*, 16 Va. App. 229, 231, 429 S.E.2d 37, 38 (1993).

[130] *See Andrews v. Creacey*, 56 Va. App. 606, 635-36, 696 S.E.2d 218, 231-32 (2010) (concluding wife did not preserve her argument that the trial court erred in not providing written findings of the statutory factors that supported its spousal support award); *West v. West*, 53 Va. App. 125, 131, 669 S.E.2d 390, 393 (2008) (finding that Rule 5A:18 barred consideration of father's claim on appeal that the trial court erred in awarding spousal support by failing to provide written findings required by Code §20-107.1(F)). A trial "court's failure to comply with the affirmative statutory duty . . . to make 'written findings and conclusions'" does not constitute "a basis for applying the ends of justice exception" to Rule 5A:18. *Courembis v. Courembis*, 43 Va. App. 18, 28, 595 S.E.2d 505, 510 (2004); *see also Andrews*, 56 Va. App. at 636, 696 S.E.2d at 232 (same).

[131] *Herring v. Herring*, 33 Va. App. 281, 287-89, 532 S.E.2d 923, 927 (2000) (cited in *Andrews*, 56 Va. App. at 632, 696 S.E.2d at 232).

[132] Rules 5:9, 5A:6(a), & 5A:3(a); *Turner v. Commonwealth*, 2 Va. App. 96, 98, 341 S.E.2d 400, 401 (1986).

[133] Rule 5:14(a).

[134] Rules 5A:3(a) & 5A:3(c)(2).

[135] Rules 5:11(b) & 5A:8(a).

[136] Rule 5A:8.

[137] Rule 5:11(c).

[138] Rule 5A:12(a), 5A:3(c)(2).

[139] Rule 5A:25(a).

[140] Rule 5A:19.

[141] *See Settle v. Commonwealth*, 55 Va. App. 212, 224, 685 S.E.2d 182, 188 (2009) (failure to join an indispensable party is considered a jurisdictional defect that requires dismissal of the appeal); *Watkins v. Fairfax Cnty. Dep't of Family Servs.*, 42 Va. App. 760, 770-71, 595 S.E.2d 19, 24-25 (2004) (an indispensable party must be named in the notice of appeal to properly perfect the appeal).

[142] Michael T. Judge & Stephen R. McCullough, *Criminal Law and Procedure*, 44 U. RICH. L. REV. 339, 347-48 (2009). *See generally Woody v. Commonwealth*, 53 Va. App. 188, 670 S.E.2d 39 (2008).

[143] *Ghameshlouy v. Commonwealth*, 279 Va. 379, 394, 689 S.E.2d 698, 706 (2010) (finding the Commonwealth's submission of a brief acted as a waiver of its jurisdictional argument based on appellant's failure to name the Commonwealth as an indispensable party); *Roberson v. Commonwealth*, 279 Va. 396, 406-07, 689 S.E.2d 706, 712 (2010) ("The controlling documents for determining what entity served as the prosecuting authority" in a criminal trial — and therefore is an essential party for appellate purposes — include the "summons, warrant, or indictment, under which the charge is brought" and the court's "orders of conviction and sentencing that conclude the trial.").

[144] Effective July 1, 2010, the rules of the Court of Appeals were changed to require assignments of error rather than questions presented. See Rule 5A:12(c)(1).

[145] *McDowell v. Commonwealth*, 57 Va. App. 308, 318-19, 701 S.E.2d 820, 825 (2010) (quoting *McLean v. Commonwealth*, 30 Va. App. 322, 329, 516 S.E.2d 717, 720 (1999) (*en banc*)); Rule 5:17(c); Rule 5A:12(c). "[A]n issue abandoned at trial may not be resurrected on appeal, and an appellate court may not 'recast' an argument made in a lower court into a different argument upon which to base its decision." *Commonwealth v. Brown*, 279 Va. 235, 240-41, 687 S.E.2d 742, 744-45 (2010) (quoting *Clifford v. Commonwealth*, 274 Va. 23, 25, 645 S.E.2d 295, 297 (2007)).

[146] *Carroll v. Commonwealth*, 280 Va. 641, 649, 701 S.E.2d 414, 418 (2010) (citing *First Nat'l Bank of Richmond v. William R. Trigg Co.*, 106 Va. 327, 342, 56 S.E. 158, 163 (1907)).

[147] *Heinrich Schepers GmbH & Co. v. Whitaker*, 280 Va. 507, 514, 702 S.E.2d 573, 576 (2010); *Covel v. Town of Vienna*, 280 Va. 151, 163, 694 S.E.2d 609, 616 (2010); *Smith v. Mountjoy*, 280 Va. 46, 52-53 n.4, 694 S.E.2d 598, 602 n.4 (2010).

[148] *Carroll*, 280 Va. at 649, 701 S.E.2d at 418 (quoting *Yeatts v. Murray*, 249 Va. 285, 290, 455 S.E.2d 18, 21 (1995)). *See also Maine v. Adams*, 277 Va. 230, 241-42, 672 S.E.2d 862, 868 (2009) ("A party who asks this Court to consider whether a circuit court's holding was erroneous is required to assign error to the challenged holding so that it may be identified properly for our consideration."); *Hillcrest Manor Nursing Home v. Underwood*, 35 Va. App. 31, 39 n.4, 542 S.E.2d 785, 789 n.4 (2001) (declining to consider an issue on appeal because it was not "expressly stated" in the questions presented). *Cf. Moore v. Commonwealth*, 276 Va. 747, 753, 668 S.E.2d 150, 153 (2008) (assignment of error incorrectly referring to "probable cause" instead of "reasonable suspicion" was clear enough to allow appellate review because it "left no doubt that a Fourth Amendment violation was the subject of his appellate claim").

[149] *Ottofaro v. City of Hampton*, 265 Va. 26, 35, 574 S.E.2d 235, 239-40 (2003); Rule 5:17(c). "[U]nlike Rule 5A:18, Rule 5A:12 contains no 'good cause' or 'ends of justice' exception." *McDowell v. Commonwealth*, 57 Va. App. 308, 318-19, 701 S.E.2d 820, 825 (2010) (citing *Thompson v. Commonwealth*, 27 Va. App. 620, 626, 500 S.E.2d 823, 826 (1998)).

[150] *Jay v. Commonwealth*, 275 Va. 510, 520, 659 S.E.2d 311, 317 (2008).

[151] *Commonwealth v. Luzik*, 259 Va. 198, 206, 524 S.E.2d 871, 876 (2000) (citing *Lockheed Info. Mgmt. Sys. v. Maximus*, 259 Va. 92, 524 S.E.2d 420 (2000)) ("[I]f a matter is appealed and a party fails to preserve a challenge to an alleged error made by the trial court by assignment of error or cross-error, the judgment of the trial court becomes final as to that issue, . . . and precludes further litigation of that issue."). "In the absence of statute the phrase, law of the case," Justice Holmes explained, "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (citations omitted).

[152] *Parfitt v. Parfitt*, 277 Va. 333, 344, 672 S.E.2d 827, 831 (2009); Rule 5:17(c)(6); Rule 5:27; Rule 5A:20(e).

[153] *Doering v. Doering*, 54 Va. App. 162, 171 n.3, 676 S.E.2d 353, 357 n.3 (2009) (quoting *Buchanan v. Buchanan*, 14 Va. App. 53, 56, 415 S.E.2d 237, 239 (1992)). *See also Prieto v. Commonwealth*, 278 Va. 366, 382, 682 S.E.2d 910, 917 (2009) (Simply restating the assignment of error itself "does not constitute an argument in support of the error assigned" and results in waiver. (quoting *Teleguz v. Commonwealth*, 273 Va. 458, 473, 643 S.E.2d 708, 718 (2007))); *Andrews v. Commonwealth*, 280 Va. 231, 252, 699 S.E.2d 237, 249 (2010) ("Lack of an adequate argument on brief in support of an assignment of error constitutes a waiver of that issue." (citations omitted)); *Fadness v. Fadness*, 52 Va. App. 833, 851, 667 S.E.2d 857, 866 (2008) (Parties, believing the lower court erred, but failing "to present that error to us with legal authority to support their contention . . . waive[] their right to have these issues reviewed by this Court.").

[154] *Artis v. Jones*, 52 Va. App. 356, 364 n.1, 663 S.E.2d 521, 524 n.1 (2008) (citing *Haugen v. Shenandoah Valley Dep't of Soc. Servs.*, 274 Va. 27, 42-43, 645 S.E.2d 261, 270 (2007)). *See also Anderson v. Commonwealth*, 251 Va. 437, 439, 470 S.E.2d 862, 863 (1996) (holding appellant bore burden of furnishing record sufficient to permit appellate review); *Davis v. Commonwealth*, 35 Va. App. 533, 537, 546 S.E. 2d 252, 254 (2001) ("[Appellant] has the burden to preserve an adequate record on appeal to allow us to consider the propriety of the trial court's actions."); *Kerr v. Commonwealth*, 35 Va. App. 149, 151, 543 S.E.2d 612, 613 (2001) ("The burden is upon the appellant to provide us with a record which substantiates the claim of error." (quoting *Jenkins v. Winchester Dep't of Social Servs.*, 12 Va. App. 1178, 1185, 409 S.E.2d 16, 20 (1991))).

[155] *Patterson v. City of Richmond*, 39 Va. App. 706, 717, 576 S.E.2d 759, 764-65 (2003) (noting importance of presenting an appendix that contains all parts of record "essential to the resolution of the issue" and stating that in absence of certain exhibits, "we will not decide the issue," but not discussing provision of Rule 5A:25(h) permitting court, in its discretion, to consult material contained in record but not in appendix).

[156] *Id.*

[157] *Alford v. Commonwealth*, 56 Va. App. 706, 710, 696 S.E.2d 266, 268 (2010).

[158] *Delaney v. Commonwealth*, 55 Va. App. 64, 68-69, 683 S.E.2d 834, 836 (2009).

[159] *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment).

[160] *Brittle v. Commonwealth*, 54 Va. App. 505, 513, 680 S.E.2d 335, 339 (2009) (citing *Rowe v. Commonwealth*, 277 Va. 495, 503, 675 S.E.2d 161, 165 (2009)). *See also Charles v. Commonwealth*, 270 Va. 14, 20, 613 S.E.2d 432, 435 (2005) ("Denying [appellant] his liberty on the basis of a void sentence would impose a grave injustice upon him. The application of the ends of justice exception is, therefore, fully justified in this case."); *Scialdone v. Commonwealth*, 279 Va. 422, 689 S.E.2d 716 (2010) (In the "particular facts and procedural history" of a due process challenge to summary contempt raised at an appellate bail-bond hearing, the court should have vacated its earlier ruling, despite there being no motion to do so.).

[161] *Brittle*, 54 Va. App. at 514-16, 680 S.E.2d at 340-41. *See also Commonwealth v. Cary*, 271 Va. 87, 98, 623 S.E.2d 906, 912 (2006) ("Indeed, in *Jimenez*, we held the failure of the trial court to properly instruct the jury was so serious as to warrant invoking the 'ends of justice' exception of Rules 5A:18 and 5:25 despite the defendant's failure to object to the improper instruction actually given." (citing *Jimenez v. Commonwealth*, 241 Va. 244, 251, 402 S.E.2d 678, 681-82 (1991))); *Atkins v. Commonwealth*, 257 Va. 160, 178 n.9, 510 S.E.2d 445, 456 n.9 (1999) (holding failure to raise "a precise objection to the Commonwealth's proposed verdict form" did not bar consideration of issue on appeal where defendant "consistently stated his preference for the form" he had proffered)); *Pilot Life Ins. Co. v. Karcher*, 217 Va. 497, 498, 229 S.E.2d 884, 885 (1976).

[162] *Alford v. Commonwealth*, 56 Va. App. 706, 709, 696 S.E.2d 266, 267-68 (2010).

[163] *Straessle v. Air Line Pilots' Ass'n, Int'l*, 253 Va. 349, 354-55, 485 S.E.2d 387, 390 (1997) ("The procedural bar of Rule 5:25 cannot be used to grant full faith and credit to an order which is not final.").

[164] *Roadcap v. Commonwealth*, 50 Va. App. 732, 742 n.3, 653 S.E.2d 620, 625 n.3 (2007).

[165] *Edwards v. Commonwealth*, 41 Va. App. 752, 761, 589 S.E.2d 444, 448 (2003) (*en banc*).

[166] *See, e.g.*, Charles E. Friend, *The Law of Evidence in Virginia* § 17-15, at 677 (6th ed. 2003) ("If no objection is made to the qualifications of the witness at trial, the objection will not be noted on appeal."); *Andrews v. Commonwealth*, 280 Va. 231, 268, 699 S.E.2d 237, 258 (2010) (refusing to consider appellant's argument that expert's testimony was unreliable because "at no point was an objection raised"); *Muhammad v. Commonwealth*, 269 Va. 451, 514, 619 S.E.2d 16, 52 (2005) (rejecting appellant's argument that certain "testimony was expert in nature" because he "did not object at trial"); *Vinson v. Commonwealth*, 258 Va. 459, 466, 522 S.E.2d 170, 175 (1999) (concluding defendant waived objection to testimony of mental health expert "for lack of proper objection in the trial court").

[167] Friend, *The Law of Evidence in Virginia* §17-15, at 676. Under the federal rules, "[t]he question is not whether this witness is more qualified than other experts in the field; rather, the issue is whether the witness is more competent to draw the inference than the lay jurors and judge." 1 John W. Strong, *et al.*, *McCormick on Evidence* § 13, at 71 (6th ed. 2006).

[168] "The trier of fact must determine the weight of the testimony and the credibility of the witnesses," and the "evidence of an expert witness should be given the same consideration as is given that of any other witness, considering his opportunity for knowledge of the subject and subject matter as to which he testifies, his

appearance, conduct, and demeanor on the stand." *Wheeler v. Wheeler*, 42 Va. App. 282, 295-96, 591 S.E.2d 698, 705 (2004) (citation omitted) (quoting *McLane v. Commonwealth*, 202 Va. 197, 206, 116 S.E.2d 274, 281 (1960). *See, e.g., United States v. Fulford*, 980 F.2d 1110, 1116 n.3 (7th Cir. 1992) (noting "when a defendant objects to the nature of an expert's testimony but fails to object to the expert's qualifications, he waives any objections as to the witness' qualifications on appeal").

[169] *Williams v. Gloucester Sheriff's Dep't*, 266 Va. 409, 411, 587 S.E.2d 546, 548 (2003) (quoting *Reid v. Boyle*, 259 Va. 356, 372, 527 S.E.2d 137, 146 (2000)*); see also Vasquez v. Mabini*, 269 Va. 155, 163, 606 S.E.2d 809, 813 (2005) (finding Rule 5:25 satisfied when appellant "moved to strike" at the conclusion of the expert's testimony when "the flaws had become apparent").

[170] Kent Sinclair, *et al.*, *Virginia Evidentiary Foundations* §3.1, at 30 (1998); *see also Johnson v. Raviotta*, 264 Va. 27, 33, 563 S.E.2d 727, 731 (2002) ("[A]n objection must be made contemporaneously with the introduction of the objectionable evidence . . . when the trial court is in a position, not only to consider the asserted error, but also to rectify the effect of the asserted error"); *Zook v. Commonwealth*, 31 Va. App. 560, 568, 525 S.E.2d 32, 35-36 (2000) ("To be timely, an objection to the admissibility of evidence must be made when the occasion arises — that is, when the evidence is offered, the statement made or the ruling given." (quoting *Harward v. Commonwealth*, 5 Va. App. 468, 473, 364 S.E.2d 511, 513 (1988))).

[171] *See* FED. R. CIV. P. 26(a)(2)(A) (requiring that, "[i]n addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705").

[172] *Rambus, Inc. v. Infineon Techs.* AG, 145 F. Supp. 2d 721, 725 (E.D. Va. 2001) (quoting FED. R. CIV. P. 26(a) 1993 advisory committee notes).

[173] *Id.*; *See also Rohan v. Networks Presentations LLC*, 375 F.3d 266, 274 n.11 (4th Cir. 2004) (discussing provision in Rule 37(c)(1) that a party failing to disclose the information required by Rule 26(a) may not use the undisclosed evidence unless the party has "substantial justification" or the "failure is harmless").

[174] *See* FED. R. CIV. P. 26(a)(2)(D); *Carr v. Deeds*, 453 F.3d 593, 604 (4th Cir. 2006) (upholding trial court's exclusion of expert testimony where report "provide[d] absolutely no information about his qualifications, any publications authored by him, the compensation he would be paid for his work and testimony, or other cases in which he had testified as an expert."); *Rambus, Inc. v. Infineon Techs. AG*, 145 F. Supp. 2d 721, 728-29 (E.D. Va. 2001) (stating that FED. R. CIV. P. 26(a) serves to "control the timing of expert disclosures" and "inform the parties that expert opinions not timely disclosed will not be permitted in evidence at trial").

[175] See FED. R. CIV. P. 26(e)(1).

[176] *See S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 598 (4th Cir. 2003) (finding no error by trial court in excluding expert's "new opinion" where expert stated at deposition and in his supplemental report "that he had completed his opinions" but failed to notify opponent of his "third opinion").

[177] *Id.* at 595; *see also Perkins v. United States*, 626 F. Supp. 2d 587, 591 (E.D. Va. 2009) (stating "[t]he burden is on the plaintiff to prove . . . harmlessness, . . . and [plaintiff] fails to meet this burden."); *Blevins v. New Holland N. Am., Inc.*, 128 F. Supp. 2d 952, 960 (W.D. Va. 2001) (allowing expert to rely on study that was not disclosed pursuant to Rule 26's reporting requirement where trial court determined that it did "not appear that the plaintiff has been unfairly prejudiced").

[178] *See, e.g., Certain Underwriters at Lloyd's v. Sinkovich*, 232 F.3d 200, 202 (4th Cir. 2000) (finding district court, although acting within discretion in limiting undisclosed expert's testimony to lay opinion, erred in allowing witness to give expert opinion).

[179] *See Michelone v. Desmarais*, 25 Fed. App'x. 155, 158 (4th Cir. 2002) (unpublished) (holding magistrate judge did not abuse her discretion in finding that the late filing violation of Rule 26(a)(2)(C) was harmless).

[180] *See Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 295-96 (E.D. Va. 2001) (noting that ghost-writing of expert report by attorney was inappropriate but deferring decision until trial to allow plaintiff's counsel to adduce sufficient evidence of ghost-writing).

[181] 6 *Moore's Federal Practice – Civil* § 26.23.

[182] *See* Va. Sup. Ct. Rule 4:1(b)(4)(A) (permitting party to use interrogatories, depositions, and "other means" to discover identity of opponent's expert, subject matter of the testimony, facts and opinions supporting the testimony, and the grounds for the expert's opinions); *Flora v. Shulmister*, 262 Va. 215, 222, 546 S.E.2d 427,

430 (2001) (noting the "facts known and opinions held by experts . . . in anticipation of litigation . . . [are] discoverable only under Rule 4:1(b)(4)."); *Cirrito v. Cirrito*, 44 Va. App. 287, 317, 605 S.E.2d 268, 282 (2004) (reversing trial court's award of sanctions where opponent "never asked [proponent of expert] for the expert reports pursuant to Rule 4:1," and "never made a motion to compel the reports and never asked for sanctions.").

[183] *See John Crane, Inc. v. Jones*, 274 Va. 581, 593, 650 S.E.2d 851, 857 (2007) (finding trial court did not err in excluding expert's testimony where appellant disclosed the "topic," but not the "substance" of the expert's opinion and testimony).

[184] Va. Sup. Ct. Rule 4:1(e) (imposing a "duty to supplement" answers to interrogatories upon learning that answer is incomplete or inaccurate in a material way*); see Ayala v. Aggressive Towing & Transp., Inc.*, 276 Va. 169, 174, 661 S.E.2d 480, 483 (2008) (finding defendants failed to "timely supplement[] their discovery disclosures").

[185] *See generally John Crane, Inc. v. Jones*, 274 Va. 581, 650 S.E.2d 851 (2007).

[186] *Id.* at 592, 650 S.E.2d at 856.

[187] *Id.* at 593, 650 S.E.2d at 857.

[188] *See* Va. Sup. Ct. Rule 1:18(A) ("In any civil case the parties, by counsel of record, may agree and submit for approval and entry by the court a pretrial scheduling order. If the court determines that the submitted order is not consistent with the efficient and orderly administration of justice, then the court shall notify counsel and provide an opportunity to be heard.").

[189] *Kirk Timber & Farming Co. v. Union Camp Corp.,* 56 Va. Cir. 335, 339 (2001).

[190] *See id.*

[191] *See Ange v. York/Poquoson Dep't of Soc. Servs.*, 37 Va. App. 615, 624, 560 S.E.2d 477, 478 (2002) ("'All litigants . . . are required to comply with court orders and their failure to do so subjects them to the sanction powers of the court.'" (quoting *Parish v. Spaulding*, 257 Va. 357, 363, 513 S.E.2d 391, 394 (1999))); *see also Uniform Pretrial Scheduling Order*, Va. Sup. Ct. Rule 1:18(B), Form 3 (2000) (stating that, once requested, "all information discoverable under Rule 4:1(b)(4)(A)(1) of the Rules of Supreme Court of Virginia shall be provided or the expert *will not ordinarily be permitted to express any nondisclosed opinions at trial*" (emphasis added)).

[192] Va. Sup. Ct. R. 4:12(a)(2).

[193] *Denise v. Tencer*, 46 Va. App. 372, 398, 617 S.E.2d 413, 426 (2005) (quoting Va. Sup. Ct. R. 4:12(b)(2)).

[194] 1 W. Hamilton Bryson, *Bryson on Virginia Civil Procedure* §9.11 (4th ed. 2005).

[195] *See* Va. Sup. Ct. R. 4:12(d). *See also* Va. Sup. Ct. Rule 4:12(b)(2) (where a designated witness "fails to obey an order to provide or permit discovery, . . . the court . . .may make such orders in regard to the failure as are just"); *Walsh v. Bennett*, 260 Va. 171, 175, 530 S.E.2d 904, 907 (2000) (recognizing the trial court has "'broad discretion' in determining the appropriate sanction for failure to comply with an order relating to discovery"); *Woodbury v. Courtney*, 239 Va. 651, 654, 391 S.E.2d 293, 295 (1990) ("Rule 4:12 gives the trial court broad discretion in determining what sanctions, if any, will be imposed upon a litigant who fails to respond timely to discovery.").

[196] *Am. Safety Cas. Ins. Co. v. C.G. Mitchell Constr.*, 268 Va. 340, 353, 601 S.E.2d 633, 640 (2004) ("[W]e cannot say that the circuit court abused its discretion in choosing to enter judgment by default against the disobedient party.").

[197] Va. Sup. Ct. R. 4:12(b)(2).